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IN THE

Supreme Court of the United States

October Term, 1965
No. 991

PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Motion to Affirm With Argument and Points and Authorities in Support Thereof.

BYRON B. GENTRY,
Pasadena City Prosecutor,
303 Hall of Justice,
Pasadena, California,
Attorney for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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PETER WYLAN,

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vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO AFFIRM.

(The Judgment of the Appellate Department of the Superior Court, in and for the County of Los Angeles, State of California, sustaining the Judgment and Sentence of the Municipal Court in and for the Pasadena Judicial District.)

ARGUMENT AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION.

I.

The Appellate Department of the Superior Court, In and for the County of Los Angeles, State of California, has direct appellate jurisdiction over all Inferior Courts within the county, of which the Municipal Courts in both the Los Angeles and Pasadena Judicial Districts are included, as are all other Municipal Courts within the county.

Thus the so-called "authority" cited by Counsel for Appellant in his "Motion To Ask Leave of Court To Supplement The Jurisdictional Statement" is no authority at all, but merely the opinion of a trial judge in a neighboring Inferior Court Judicial District. A trial judge, incidentally, who stands in the same position as the judge from whom this appeal was originally taken to the Appellate Department of the Superior Court, which has direct appellate jurisdiction over both of them; and which court had already ruled to the *contra* on numerous occasions involving almost identical fact situations and a specific challenge to the same statute.

It may indeed be true that these decisions and their opinions were not reported in the official California Appellate Reports. The decisions of the Appellate Department of the Superior Court rarely are. However, this does not make them any the less binding upon the Municipal Courts within this county.

Such opinions are nonetheless routinely reported in the form of "Memorandum Opinions", on loose-leaf, mimeographed forms; and made available to all Municipal Court Departments within the County; the Law Library; Prosecutors; City Attorneys; and any private

Counsel sufficiently interested in an Inferior Court practice to arrange for the service.

The Appellate Department of the Superior Court, in and for the County of Los Angeles, has in fact, as recently as November 18, 1965, written a nineteen page opinion sustaining the constitutionality of the Penal Code Section here under attack by appellant, to wit: Section 650½ of the Penal Code of the State of California, on the identical points herein raised by appellant. That case is *People v. Jeanne Davis, etc. Harlan Clay Davis,* CR A 6430 and CR A 6431.

In that opinion, the Appellate Department makes the following specific statement:

> "Our Appellate Department of the Los Angeles Superior Court had before it the questions of whether Penal Code Section 650½ is vague and whether it is unconstitutional. Our Appellate Department has upheld the section. We see no reason to change. It is not vague or unconstitutional. *People v. Neary, (1964) CR A. 5678; People v. Burt (1963) CR A 5264; People v. Sun Era (1964) CR A 5818; People v. Smith (1963) CR A 5214; People v. Rohauer (1959) CR A 3911.* The State has preempted the field of law on sexual activity, and Penal Code Section 650½ is a portion of the sexual activity statutes of the State, thus approving from a practical standpoint its constitutionality. *In re Lane (1962) 58 Cal. 2d. 99, 104; In re Moss (1962) 58 Cal.App. 2d. 117, 119.* The constitutionality is assumed, also, in *People v. Proctor (1956) 46 Cal. 2d. 481, 482, 483.* These cases also recognize that California's scheme of justice recognizes both sections 314, and 650½ of the Penal Code."

II.

In the instant case it is our contention that a dental office in a regular professional building in a populous city is as much a "public place" as a barber shop, which was specifically held to be a "public place" in this state in the case of *In re Zorn* (1963), 59 Cal. 2d 650. 652. See also *United States v. Barner* (1961), 195 Fed. Supp. 103, 105.

We contend further that it is an offense against public morals and an outrage to "public decency" for a dentist in such an establishment, licensed by the State of California to practice a presumably respectable profession, to surreptitiously take the hand of an unsuspecting woman patient as she sits in his dental chair, pull it down and back where she could not see, and place it upon his bare penis during the course of his professional practice as a dentist.

That he did not in fact "expose his private parts" to her shocked and outraged view, thus escaping the more specific prohibition of Penal Code Section 314, should not make him any the less culpable under an appropriate statute, in this instance Section 650½ for his indecent and reprehensible conduct against public decency.

> "Statutes are to be construed, if their language permits, so as to render them valid and constitutional rather than invalid and unconstitutional. The proper construction to be given to a statute is to be found by construing it as a whole and harmonizing its various parts." *People v. Hampton* (1965), 236 A.C.A. 920 (syllabus).

The offenses charged in this case give sufficient notice of the offenses with which Appellant was charged in the trial court. *People v. Roberts* (1953), 40 Cal. 2d 483; *People v. Price* (1941), 46 Cal. App. 2d 59, 61; *People v. Severino* (1953), 122 Cal. App. 2d 172, 179, 181.

III.

Penal Code Section 650½ is a general law prohibition, intended by the State Legislature to cover those offenses against public decency and good morals which have not been stated directly and prohibited by being made specifically punishable in other sections of the Penal Codes of California.

Legislatures cannot possibly receive evidence on all possible variations of potential violations against decency, the human mind and character being what it is, yet they may nonetheless word a valid penal statute to protect the public from the weird machinations of such minds and character. The variation in human conduct is such that a general standard may be referred to provided that standard is a matter of common thinking and knowledge throughout the state. We are not dealing here with a City Ordinance of some over-sensitive city. Section 650½ of the Penal Code of the State of California is an enactment by the lawmakers of the entire State.

The word "public" is defined in the dictionary and is commonly accepted to mean "the general body of mankind or of a nation, state, or community." *Gardner v. Vic Tanny Compton, Inc.* (1960), 182 Cal. App. 2d 506, 510; *In re Zorn* (1963), 59 Cal. 2d 650, 652; *United States v. Barner* (1961), 195 Fed. Supp. 103, 105.

IV.

The United States Supreme Court in upholding this same Appellate Department in *Roth v. U.S.* and *Alberts v. California* (1957), 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, declared:

> "Lack of precision in a criminal statute is not itself offensive to the requirements of due process; the constitution does not require impossible standards, and all that is necessary is that the language convey sufficient definite warning as to the proscribed conduct when measured by common understanding and practices."
>
> "Freedom of expression can be constitutionally suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." (From separate opinions by Justices Douglas and Black.)

This last quotation obviously means *conduct,* and we are concerned only with the conduct of Appellant in the instant case.

V.

In *Williams v. United States* (1951), 341 U.S. 97, 71 S. Ct. 376, the Court upheld 18 U.S.C.A. (1952), Sec. 242, making it a crime for "any person, under color of any law, to subject any inhabitant to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States."

We respectfully submit that this is a clear-cut example of a "catch-all statute", and therefore precedent for the constitutionality of such a statute as the one under attack here.

VI.

In *Jordan v. De George* (1950), 341 U.S. 223, 231, 232, the United States Supreme Court in a moral turpitude case said:

> "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. *United States v. Wurzbach, 280 U.S. 396, 399; 74 L. Ed. 508, 510; 50 S. Ct. 167 (1930).* Impossible standards of specificity are not required. *United States v. Petrillo, 332 U.S. 1; 91 L. Ed. 1877; 67 S. Ct. 1538 (1947).* The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Connally v. General Constr. Co. 269 U.S. 385; 70 L. Ed. 322; 46 S. Ct. 126 (1926).*"

Again we respectfully submit that this test has been satisfactorily met in the instant case.

VII.

The fundamental fallacy in the argument of Counsel for Appellant is that because application of a law under *possible circumstances, or the facts of some possible occurrence, might constitute a violation of one's constitutional rights that therefore the statute is unconstitutional, and that the constitution was violated in the instant case.*

In a recent decision the California Supreme Court in the case of *Franklin Insurance Co. v. State Board of Equalization* (1965), 63 A. C. 221, 226, held:

> "The valid employment of the statute in the present situation does not fail because the statute might be improperly involved in other situations. . . . It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (Citing cases). The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual contention now before the court."

VIII.

Conclusion.

As we have previously suggested, we are not dealing here with the somewhat intangible subject of pornography. We are not dealing with the far-reaching constitutional right of free press or freedom of expression. We are instead dealing with conduct.

The sweeping charges of vagueness and unconstitutionality made by appellant, because of lack of particularity, may indeed make consideration of their contents unnecessary. In *Whitney v. California* (1927), 274 U.S. 357 at p. 369, 71 L. Ed. 1095, the court states that one assailing a legislative classification as unconstitutional has the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary:

> "A state may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses."

Under the Federal constitution, the United States Supreme Court is assumed to be limited to a consideration of the specific denials of federal rights. In *Nash v. U.S.* (1913), 229 U.S. 373, 57 L. Ed. 1232, opinion by Mr. Justice Holmes, the court contemplates the matter of vagueness in a criminal statute and states (at p. 377 U.S.; p. 1235 L. Ed.):

> ". . . the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. . . . *The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.*" (Emphasis ours.)

If we may paraphrase the language of the court in *People v. Radaha* (1947), 69 N.Y.S. 2d 722, in its definition of "public decency" on page 724:

Public decency as used in this statute connotes the moral standard by which the people in the various communities of the State abide. That standard does not include the type of conduct practiced by the appellant here. To come within the Statute that set standard need not be outraged by acts coming to the attention of the majority of the people of the state, or even of one community. It is outraged just as surely if the acts come to the attention of only one person who lives and relies on that standard. The use of the term "public decency" in this statute is in a subjective rather than an objective sense.

It is respectfully submitted that for the foregoing reasons, the judgment and sentence of the state courts should be affirmed.

BYRON B. GENTRY,

Pasadena City Prosecutor,

Attorney for Appellee.

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